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July 7, 2000

Mary L. Cottrell, Secretary  
Massachusetts Department of Telecommunications  
and Energy  
One South Station, Second Floor  
Boston, Massachusetts 02110

Re: Docket 98-57 / FCC's Supplemental Order Clarification,

Released June 2, 2000

Dear Ms. Cotrell:

On June 2, 2000, the FCC released its Supplemental Order Clarification in CC Docket No. 96-98. Reaffirming its concern that "permitting the use of combinations of unbundled network elements in lieu of special access could cause substantial market dislocations and...threaten an important source of funding for universal service", the FCC issued the Supplemental Clarification Order to "extend and clarify" the temporary constraints on conversions of Special Access to combinations of unbundled loop and transport network elements (i.e., "Enhanced Extended Links" or "EELs") it had adopted in its November 24, 1999, Supplemental Order, pending the FCC's resolution of the Fourth FNPRM. *Id.* at 7. Specifically, in the Supplemental Order Clarification the FCC: (1) extends the temporal constraint identified in the Supplemental Order to assure that the status quo is maintained while the agency compiles an adequate record for addressing the legal and policy disputes at issue in the Fourth FNPRM; (2) clarifies what constitutes "a significant amount of local exchange service"; (3) clarifies that incumbent local exchange carriers ("LECs") must allow requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled network elements, and expressly permits LECs to conduct "limited audits" by an independent third party to verify the carriers compliance with the significant local exchange service requirement; (4) prohibits commingling of Special Access and loop-transport combinations; and (5) clarifies collocation requirements for loop-transport arrangements. See Supplement Clarification Order at ¶¶1, 8, 22, 24, 28, and 29.

As discussed below, this "clarification" order has a direct impact on a number of issues raised by BA-MA in its pending motion for reconsideration and offers further

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support for the Department's reconsideration of certain portions of its March 24, 2000 Order entered in this docket. The Department should take administrative notice of this decision, a copy of which is attached as Exhibit A.

#### Commingling of Special Access and EEL Arrangements

In its March 24th Order, the Department ruled that BA-MA's proposal to prohibit commingling of Special Access and EEL arrangements is discriminatory and directed BA-MA to delete Part B, Section 13.1.1.B from D.T.E. Tariff No. 17. See March 24, 2000 Order, at 90 (Part VII, Section A.3). In rendering its decision, the Department noted that, in its view, the Supplemental Order did not address "the issue of EEL being connected through special access facilities for use in providing local services." Id. BA-MA sought reconsideration with respect to this issue on April 13, 2000. See BA-MA Mot. For Recon. dated 4/13/00 (MA DTE 98-57), at 24-26 (Section II.F). In the Supplemental Clarification Order, the FCC directly addressed this issue and clarified its position that such commingling should not be permitted even where the carrier is using special access facilities to provide a significant amount of local service. Supplemental Clarification Order, at ¶ 28 ("We further reject the suggestion that we eliminate the prohibition on "commingling" (i.e., combining loops or loop-transport combinations with tariffed special access services) in local usage options discussed above." (citations omitted))). In clarifying this issue, the FCC clearly expressed its concern—a concern shared by BA-MA—that allowing such commingling would allow IXCs to use these unbundled network elements "primarily to bypass special access services." Id. In light of the FCC's clarification with respect to this issue, the Department should reconsider its March 24th Order and reinstate the language restricting commingling of special access and EEL arrangements contained in Part B, Section 13.1.1.B of D.T.E. Tariff No. 17.

#### Significant Local Use and Audit Provisions

In its March 24th Order, the Department also ruled that the definition of a "significant amount of local exchange service is best left to the FCC or an industry collaborative, rather than definitions proposed by BA-MA in Part B, Section 13.3.1.A of Tariff 17. In the Supplemental Clarification Order the FCC resolved this issue, holding that until the FCC resolves the issues in the Fourth FNPRM, "IXCs may not substitute an incumbent LEC's unbundled loop-transport combinations for special access unless they provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer." Supplemental Clarification Order at ¶ 8. The FCC clarified the meaning of "significant amount of local exchange service" and promulgated standards that must be met by a CLEC before it can convert a Special Access service to a loop-transport combination. Supplemental Clarification Order, at ¶¶ 21, 22, and 23. In its Order, the FCC found that a requesting carrier is providing a "significant amount of local exchange service" to a particular customer if it meets one of three local usage options. The FCC largely adopted the options jointly proposed by Bell Atlantic and several CLECs in a February 28, 2000, ex parte filing. BA-MA has proposed similar language in Part B, Section 13.3.1.A of D.T.E. Tariff No. 17. The FCC held that this language represents a "reasonable compromise proposal under which it may be determined that a requesting carrier has taken affirmative steps to provide local exchange service to a particular end user and is not seeking to use unbundled loop-transport combinations solely to bypass tariffed special access service." Id. The Department should take administrative notice of the FCC's Clarification Order in connection with its review of BA-MA's pending Motion for Reconsideration. This order reaffirms that BA-MA's proposed language regarding this issue (Part B, Section 13.3.1.A) is reasonable. The Department should order BA-MA to revise its proposed tariff language

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to define "significant amount of local exchange service" as it is set forth in ¶ 22 of the Supplemental Clarification Order.

In its March 24th Order, the Department also rejected BA-MA's proposal to conduct audits of EEL arrangements to assure compliance with the FCC's significant local exchange service requirement. March 24th Order, at 96. In doing so, the Department found persuasive the FCC's statement that the use constraints would be in place for only a limited amount of time and that there was no need for "incumbent LECs and requesting carriers to undertake auditing processes to monitor whether or not requesting carriers are using unbundled network elements solely to provide exchange access service." Id. at 102 (citing Supplemental Order at ¶ 5 n.9). In the Supplemental Clarification Order, the FCC expressly held that because it was extending the temporary constraints imposed in the Supplemental Order, that ILECs "may conduct limited audits...to the extent reasonably necessary to determine a requesting carriers compliance with local usage options." Supplemental Clarification Order, at ¶ 29. The FCC also provided further guidance as to the notice requirements and permissible frequency of such audits, holding that ILECs must provide at least 30 days' written notice regarding audit plans to IXCs that have purchased loop-transport combinations and that ILECs may not conduct more than one audit within a calendar year, unless an audit finds non-compliance. Id. at ¶ 31. In light of this clarification by the FCC, the Department should reconsider its previous ruling on this issue and rule that BA-MA may include language in D.T.E. Tariff No. 17 that permits BA-MA to conduct audits in accordance with the terms set forth in the FCC's Supplemental Clarification Order.

#### Collocation Requirements for EEL Arrangements

In its March 24th Order, the Department rejected BA-MA's proposal requiring EEL arrangements to terminate to a CLEC's collocation facilities, stating that it had previously ruled that imposing a facilities requirement on CLECs is a "direct contravention of the Eighth Circuit findings, and the Supreme Court decision upholding the FCC's authority to preclude a facilities requirement." See March 24th Order at 95. BA-MA has sought reconsideration of this ruling. See BA-MA Motion for Reconsideration dated June 19, 2000, at 29-30 (Section 2.H.). In its Supplemental Clarification Order, the FCC removed any doubt that a collocation provision is appropriate for both new EEL arrangements as well as conversions from Special Access service. In two of the three local usage options adopted by the Commission, the FCC held that "loop-transport combinations must terminate at the requesting carrier's collocation arrangement in at least one incumbent LEC central office." See Supplemental Clarification Order, at ¶ 22. Furthermore, the FCC held that this "limited collocation requirement" is reasonable and consistent with the FCC's previous orders and "should not impose an undue burden on requesting carriers because they require only that the circuit that the requesting carrier seeks to convert terminate at a single collocation arrangement in the incumbent LEC's network." Id. at ¶ 24. As the Department noted in its March 24th Order, a single collocation arrangement is all that BA-MA's proposed tariff language required. See March 24th Order, at 94. Therefore, in light of the FCC's recent ruling addressing this issue in the Supplemental Clarification Order, the Department should reconsider its March 24th Order and adopt a collocation requirement consistent with the FCC's decision.

#### Ordering Provisions

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In its March 24th Order, the Department also directed BA-MA to change its ordering process, through standard change control process, to allow CLECs to order all elements of an EEL arrangement in a single service order. See March 24th Order at 104 (Part VII, Section E.3). BA-MA sought reconsideration with respect to this issue and moved to open the record to permit additional information to be introduced into the record regarding BA-MA's existing ordering provisions (the Access Service Ordering Guidelines or "ASOG")--the product of industry consensus--which it proposed to use in providing EEL arrangements to CLECs. See BA-MA Mot. for Recon., at 29. In its recent Supplemental Clarification Order, the FCC expressed its confidence in the existing provisioning procedures used to deploy unbundled loop-transport combinations using the Access Service Request process, a process that carriers have used historically to provision access circuits. Supplemental Clarification Order, at ¶ 30 (emphasis added). In light of the FCC's recognition of the appropriateness of the existing ordering provisions, the Department should reconsider its March 24th Order and should not require BA-MA to alter its existing ordering provisions.

Conclusion

For all of the foregoing reasons, the Department should take administrative notice of the attached FCC Supplemental Clarification Order and reconsider its March 24th Order in light of this recent decision.

Sincerely,

Keefe B. Clemons

Enclosure

cc: Tina W. Chin, Esquire, Hearing Officer (2)

Michael Isenberg, Esquire, Director-Telecommunications Division

Attached Service List